York Casualty Co., 139 Fed. (2nd) 232. Those were Texas cases where less insurance rates were collected than were fixed by the Insurance Commission of Texas and undercharge suits were filed for the difference. The Fifth Circuit Court of Appeals there correctly held that the legal rate could be collected in the face of Article 571 Penal Code of Texas making such undercharge an offense.

Also, the decision of the Circuit Court of Appeals is in conflict with *New et al v. Denison Clay Co.*, 260 Fed. 70 by the Eighth Circuit Court of Appeals, which court held:

> "A carrier is required by law to collect, and the shipper to pay, the tariff rate on interstate shipments. This mutual obligation of carrier and shipper cannot be affected by mistake, design, or even by positive contract to the contrary. It is a liability arising from and fixed by law, exists independent of contract, and attaches to the status of interstate carriage."

6. The Circuit Court of Appeals held that the carrier could not sue to enforce the rates fixed by the Railroad Commission according to the contract to charge such rates filed with the Commission, for the sole reason that he made a later contract to charge less than the legal rate, even though he did not sue upon or require aid from the later illegal contract.

Such decision is contrary to the law and public policy of this state, as decided by the Supreme Court in *Beer v. Landman*, 88 Tex. 450, where it was held:

"The plaintiff cannot recover whenever it is neces-

> sary for him to prove as part of his cause of action, his own illegal contract or other illegal transaction, but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear and may be important even as explanatory of other facts in the case, he may recover."

As well as the cases of *Hall v. Edwards*, 222 SWR 167, and *Morrison v. City of Fort Worth*, 155 SWR (2nd) 908, all to the same effect.

The Circuit Court of Appeals relied solely upon *Wright v. Wight & Wight*, 229 SWR 881, but the plaintiff in that case required aid from and actually sued on a contract which he alleged was illegal.

The rule is one of substantive law which the United States Courts should follow. *Cities Service Oil Co. v. Dunlop*, 308 U. S. 208.

This Honorable Court recognized it, different from the Circuit Court's decision, in *Armstrong v. American Exchange National Bank*, 133 U.S. 433 (470), where the court held:

> "An obligation will be enforced though indirectly connected with an illegal transaction, if it is supported by an independent consideration so that plaintiff does not require aid of the illegal transaction to make out his case."

7. The Circuit Court of Appeals held that since no discrimination in rates occurred, or could occur, by a contract carrier charging less than the legally fixed rate, public policy did not require that it be enforced, as is required of common carriers.

The decision is contrary to Art. 911b Sec. 22b which includes alike both common and contract carriers as follows:

> "Declaration of Policy. The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public."

And Section 6aa which reads:

> "The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

And to the decision of the Supreme Court of Texas in *Railroad Commission v. Rio Grande & E.P.R. Co.*, 230 SWR 974, that the act was designed to prevent rebates as well as discrimination in rates. And to the decision of the 5th Circuit Court in *Stephenson v. Binford*, 53 Fed (2nd) 509 that:

> "We think that, if a state determines that the business of common carriage by rail and road may no longer, from the standpoint of public interest, be looked upon as a business entirely separate and distinct from that of contract carriers by road, that all of its available carriage services are so bound together and so interdependent that the public may not continue to have a safe and dependable system of transportation unless private carriers operating on the same roads with common carriers are brought under just and reasonable regulations, bringing their services into relation with those of common carriers thereon, no just or valid reason exists why it may not do so."

And the decision of this Honorable Court affirming that case, 286 U. S. 374, that:

> "What has just been said applies in the main to the other challenged provision authorizing the commission to prescribe minimum rates not less than those prescribed for common carriers for substantially the same service. This provision, by precluding the contract carriers from rendering service at rates under those charged by the railroad carriers, has a definite tendency to relieve the highways by diverting traffic from them to the railroads. The authority is limited to the fixing of minimum rates. The contract carrier may not charge less

than the rates so fixed, but is left free to charge as much more as he sees fit and can obtain. * * *"

8. The decision of the Circuit Court is in direct conflict with and applies the local law and public policy of the State of Texas differently from the opinion of the Attorney General of Texas, set out and supported by his brief filed in the Circuit Court, he being charged with the duty of enforcing the Motor Carrier Act, as applied to contract carriers, Art. 911b. The correct rule in Texas is stated by the Court of Civil Appeals of Texas in *Harris County v. Hammond*, 203 SWR 445, as follows:

> "(1) While the opinions of the Attorney General are not binding upon the courts, it is a well-recognized rule of decision in this state that when the construction of a statute is doubtful the construction given it by the officers of the state expressly charged with the duty of its enforcement is entitled to great weight, and, unless the court is clearly of opinion that such construction is erroneous, it should not give the statute a different meaning. Ry. Co. v. State, 81 Tex. 602, 17 S.W. 67; Stevens v. Campbell, 26 Tex. Civ. App. 213, 63 S.W. 161."

And it is the duty of Federal Courts to give it the same effect as the State Courts. *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817, 114 A. L. R. 1489.

Specifically, the Attorney General stated the public policy and the law of Texas in the Circuit Court as follows:

> "The position of the State of Texas is that an overriding public policy requires strict observance

of its legally prescribed contract carrier rate by contract carriers and shippers in Texas. This higher public policy calls for the intervention of the courts in behalf of the State to enforce through the carrier a contract, to which the shipper was a party, to pay the minimum contract carrier rates of Texas, such contract having been presented to the State administrative agency, the Railroad Commission of Texas, as the basis for the granting of a contract carrier permit, and without which contract and its obligation to conform to the State rate structure, the permit would not have been granted. The ultimate of the State's position is only that the shipper shall pay the minimum rates established by the Legislature of Texas, and embodied in the contract upon which the Railroad Commission granted the permit. 'And this is so for reasons of public policy, and not from regard for the interests of either party * * *' as was said by Associate Justice Stayton of the Texas Supreme Court (Davis v. Sittig, 65 Tex. 497), in discussing the rule that under controlling motives of public policy a court of equity may grant its aid to one of the parties in pari delicto.

"It is because of the public importance of the judgment of the court that the Attorney General of Texas has felt impelled to file this brief as amicus curiae."

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Fifth Circuit Court of Appeals commanding that court to certify and send to this Court for its review and determination a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals, Fifth Circuit, had in the case numbered and entitled on its docket No. 11313 styled *General Mills, Inc., Appellant, v. Leo H. Steele, Appellee*, to the end that this case may be reviewed and determined by this court as provided for by the Statutes of the United States; and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit be reversed with appropriate directions by this court, and for such further relief as to this court may seem proper.

Dated at Fort Worth, Texas this 2nd day of April 1946.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. _____

LEO H. STEELE, *Petitioner*

vs.

GENERAL MILLS, INC., *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The case turned on this question of local law. "This court looks to the trial court for the original examination of local questions, and relies for aid upon the explanations of its conclusions. *Texas-Louisiana v. Arkansas-Louisiana Gas Co.*, 306 U. S. 188-198; 83 L. Ed. 598-604.

2. The Circuit Court of Appeals held that the petitioner, carrier, had incapacitated himself and could not maintain this undercharge suit, because he had entered into an illegal scheme with the shipper to charge and collect a rate less than that fixed by the Railroad Commission, and such point is controlling and decisive of the case.

This decision is in direct conflict with the local laws and public policy of Texas, and elsewhere, as shown by the decisions of the courts of Texas, and the decisions of the United States courts as well as the decisions of the courts of other jurisdictions:

It is in direct conflict with the case of *Texas and New Orleans Railway Company v. East Texas Gravel Company*, 175 SWR (2nd) 435, involving an intrastate shipment where the correct rule was stated as follows:

> "We further recognize that railroad companies are charged with a public duty to collect the full amount of freight charges, according to the rate fixed by the Railroad Commission, and that they cannot by means of estoppel, *or by any other device*, escape performance of this public duty. Texas & N.O.R. Co. v. Yates, 139 Tex. 89, 161, S.W. 2d 1050."

3. The decision of the Circuit Court is in direct

conflict with the decision of the Supreme Court of Texas in *Texas N.O.R. Co. v. Yates, et al*, 161 SWR (2nd) 1050, involving intrastate shipments, where the court held that:

> "The railroad company could not by means of estoppel '*or by any other device*' escape the performance of this public duty."
>
> "In a word the purpose of our statutes, as they relate to intrastate freight rates, is in every essential respect the same as that of the Federal statutes which we had under consideration in Houston & T.C.R. Co. v. Johnson, Tex. Comm. App. 41 SW 2d 14, 83 A.L.R. 241."

Since the rule in intrastate rates in Texas is the same as for interstate shipments under the Federal statutes, the decision of the Circuit Court of Appeals is in direct conflict with the decision of the Supreme Court of Texas in *H. & T.C.R. Company v. Johnson*, 41 S.W. (2nd) 14, where the correct rule is stated by that court as follows:

> "The provisions of the statutes are such as to make the collection of those charges a public duty on the part of the carrier, and to incapacitate the carrier to refund or to remit 'in any manner or by any device' any portion of such charges. Johnson was charged with knowledge of these statutory provisions and of their legal effect. He relied at his peril on the representation that the freight charges had been prepaid; for he was charged with knowledge that the carrier could not by that means evade the public duty, imposed by the statutes, to collect the full amount of charges lawfully due."

4. Since the Texas Courts thus held that the same rule applies to intrastate shipments as applies to interstate shipments under Federal statutes, the decision of the Circuit Court of Appeals is in direct conflict with the decisions of the United States Supreme Court in *L. & N. Ry. v. Central Iron and Coal Company*, 265 U. S. 59, 68 L. Ed. 900 where the correct rule is declared that:

> "No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statutes of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor."

And with the decision of this Honorable Court in N. Y., *New Haven & Hartford R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 51 L. Ed. 515, where it was held:

> "The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purposes of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all'."

To the same effect is *Pittsburg C.C. & S.L.R.R. v. Fink*, 250 U. S. 577, 63 L. Ed. 1151.

To the same effect is the decision of the Fifth Circuit Court, directly contrary to its decision in this case, in *Western Grain v. St. Louis, San Francisco Co.*, 56 Fed. (2nd) 160.

The decision of the Circuit Court is likewise contrary to the uniform decisions of the courts of all the other jurisdictions, in the particulars above set out, as shown by the cases annotated in 83 A.L.R. pages 245 et seq which are summarized in *Georgia R. Co. v. Greety*, 5 Ga. App. 424, 63 S.E. 528, where the court held:

> " 'Some of these cases, and among them the Georgia case of Savannah, F. & W.R. Co. v. Bundick (1894) 94 Ga. 775, 5 Inters. Com. Rep. 289, 21 S.E. 995, supra, refer to the principle that, where the parties have agreed to violate the laws, the courts will not allow an action as to that matter in favor of either of them; and from this it might seem at first blush that, the shipper and the carrier having contracted for the transportation of the goods at a rate the very charging or accepting of which is a violation of law, the whole contract of transportation would be unlawful, and that the courts would not give aid to a carrier seeking to collect for the transportation charges or any part thereof, where it becomes necessary for the carrier to assume the role of plaintiff. Upon maturer reflection we are of the opinion that this position is untenable'."

5. The decision of the Circuit Court of Appeals conflicts with its decisions in *Battles v. Braniff Airways*, 146 Fed. (2nd) 336 and *Bowen Motor Coaches v. New*

III.

STATEMENT OF THE CASE

This has already been stated in the preceding Petition for Writ of Certiorari, on pages 3, 4 and 5, which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that a Delaware Corporation could enter Texas and have its commodities transported over the Texas highways and evade the payment of the freight rates therefor as fixed by the Railroad Commission, by the simple devise of entering into a second contract with the carrier for a lower rate after the Commission had issued a permit and fixed the rate.

2. The Circuit Court of Appeals erred in not applying the standards of rates as fixed by the Texas Legislature and by the Railroad Commission for contract carriers operating on Texas highways when said court refused to allow a carrier to collect said legal rate and in effect allowed a shipper to escape the payment of the legal rate simply because the shipper and the carrier entered into a second contract for a lesser rate.

3. The Circuit Court of Appeals erred in holding that a carrier could incapacitate or estop himself from collecting the freight rates as fixed by the Railroad Commission by entering into a second contract with the shipper for a lesser rate.

4. The Circuit Court of Appeals erred in holding that the public policy of Texas was contrary to the announced public policy as declared by the Legislature, the State courts, the Attorney General and the Federal District Court sitting in Texas.

5. The Circuit Court of Appeals erred in holding that a carrier was estopped from collecting the legal freight rate fixed by the Railroad Commission because the carrier had entered into a second contract for a lesser rate, since the carrier did not rely upon nor seek the aid of the second contract.

6. The Circuit Court of Appeals erred in holding that the public interest in freight rates did not override the pari delicto rule.

7. The Circuit Court of Appeals erred in holding that a carrier did not have a right and a duty to collect from a shipper the rate as fixed by the Railroad Commission for the transportation of the shipper's commodities over Texas highways.

8. The Circuit Court of Appeals erred in deciding this case upon facts and issues not considered by the trial court.

V.

ARGUMENT AND AUTHORITIES

This is a simple freight rate rebate case. The case is in the Federal Court because of the diversity of citizenship of the parties and in such instances the Federal Courts should apply the State law *Guaranty Trust Company v. York*, 65 Sup. Ct. 1464, 89 L. Ed. ..... The facts are not in dispute. Simply stated, the material facts are: the petitioner, a contract carrier, hauled the commodities of the respondent, the shipper, over Texas highways under authority of a permit issued by the Texas Railroad Commission. The Commission in 1931 promulgated General Order No. 25 and amended the same by Class and Commodity Tariff No. 1-A in 1940 relating to common and contract carrier rates. Both of said orders may be found in the appendix to this brief, referred to as Appendix "C" and "C-1" respectively. Pursuant to a written contract between the carrier and shipper in this case which provided that the parties would charge and pay the rates fixed by the Commission, and likewise pursuant to a written application addressed to the Commission, which provided that the Commission should fix the rates, the Commission did—after public hearing—grant the permit and fixed the rates as the minimum contract carrier rates pursuant to the statutory enactment of the Legislature, and pursuant to its own general rate Order No. 25 under Class and Commodity Tariff No. 1-A. The permit was dated July 9, 1941 (R. 130). Twenty-two days later, namely July 31, 1941, the carrier and the shipper entered into a second contract at

Oklahoma City (R. 208) which provided that the carrier would charge and the shipper would pay a rate less than the one provided by the Railroad Commission. This suit is for the difference between the contract rate and the commission rate.

TWO QUESTIONS OF LAW CONTROL

There are two controlling and related questions of law in this case; (1) Is petitioner (the carrier) estopped or incapacitated from prosecuting this suit against the respondent (shipper) to collect the tariff rates legally fixed by the Commission, solely because he entered into a second contract to charge and did charge and collect from respondent a lesser rate, (2) Since petitioner did not sue upon or seek or require any aid from the second contract which provided for a rate less than the rate legally fixed by the Commission, but made out his case without reference to this second contract, is he thereby prevented or estopped to recover the legal rate even though he be in pari delicto?

The majority opinion of the Circuit Court of Appeals decided both questions adversely to the petitioner, with Justice Hutcheson dissenting. The judgment of the Circuit Court is contrary to and directly in conflict with the enactments of the Texas Legislature, the decisions of the State courts, the opinion of the Attorney General and the decision of the trial court sitting in Texas.

ARGUMENT

(Specifications of Error 1, 2, 3, 4
and First Law Question)

The Supreme Court of Texas in the early case of *Railroad Commission v. Weld & Neville*, 95 Tex. 405, 73 SWR 532, announced the rule as follows:

> "The Railroad Commission Law deprived railroad companies of the power to make rates and conferred that authority upon the commission, * * * the rate-making power is taken away from the carriers altogether, and vested exclusively in the commission."

A more recent case is that of *Railroad Commission v. Uvalde Construction Co.*, 49 SWR (2nd) 1114, wherein the court said:

> "If the carrier were authorized to initiate rates or to fix same by contract with shippers, clearly the court could properly impose such a condition, precedent to granting the injunctive relief sought. But no such power obtains in this state. Here the Railroad Commission itself fixes the rate, and that rate is conclusively presumed to be reasonable, just, and not discriminatory, until declared otherwise by a court of competent jurisdiction."

In the case of *Texas and New Orleans Railway Company v. East Texas Gravel Company*, 175 SWR (2nd) 435, involving an intrastate shipment the correct rule was stated as follows:

> "We further recognize that railroad companies are charged with a public duty to collect the full

> amount of freight charges, according to the rate fixed by the Railroad Commission, and that they cannot by means of estoppel, or by any other device, escape performance of this public duty. Texas & N.O.R. Co. v. Yates, 139 Tex. 89, 161 SWR (2nd) 1050."

Likewise, the Supreme Court of Texas in the case of *Texas & N.O. Ry. Co. v. Yates*, et al 161 SWR (2nd) 1050 involving intrastate shipments the court held:

> "The railroad company could not by means of estoppel 'or by any other device' escape the performance of this public duty."
>
> "In a word the purpose of our statutes, as they relate to intrastate freight rates, is in every essential respect the same as that of the Federal statutes which we had under consideration in Houston & T.C.R. Co. v. Johnston, Tex. Com. App. 41 SW (2nd) 14, 83 A.L.R. 241."

Therefore, in Texas a carrier not only has a right to maintain a suit for undercharge in freight rates, but a duty to collect such rates. The Texas courts apply the same rule to intrastate rates as are applied to interstate rates by the Texas courts.

The decision of the majority opinion of the Circuit Court of Appeals therefore is not only in conflict with the Texas courts, but likewise in conflict with the Eighth Circuit Court of Appeals in the case of *New et al v. Denison Clay Co.*, 260 Fed. 70, where it was held:

> "A carrier is required by law to collect, and the shipper to pay, the tariff rate on interstate ship-

ments. This mutual obligation of carrier and shipper cannot be affected by mistake, design, or even by positive contract to the contrary. It is a liability arising from and fixed by law, exists independent of contract, and attaches to the status of interstate carriage."

An interesting case that cites with approval the Denison Clay case above is that of *Bottemueller v. Wilson & Co.*, 57 Fed. Sup. 766, wherein it was said:

"Quite obviously the suit is one on a hauling or transportation contract. The plaintiff undertook to perform certain services for the defendant for a compensation set out in schedules attached to a written contract. The schedule of charges did not agree with published rates filed by the plaintiff and promulgated by him as an interstate contract carrier by motor. Under such circumstances the published tariffs superseded the agreed rates and entered into and became a part of the contract just as effectively as if written therein.

"In the instant case, the plaintiff, being a contract carrier, agreed with the defendant to transport its products for compensation specified in a schedule attached to the contract. The published rates filed by the plaintiff, however, superseded the contract rates and fixed compensation to be paid the plaintiff by the defendant just as effectively as if the identical rates had been incorporated in the written agreement. The liability was not a statutory liability but a liability accruing against the defendant for services rendered by the plaintiff in transporting its merchandise and would have existed wholly apart from the contract. * * *"

"It was the hauling service that he performed for the defendant and not the statute which gave him

the right to claim compensation. All the statute did was to regulate and fix the amount of compensation to be charged and to forbid the plaintiff from collecting a lesser amount."

The Texas Supreme Court in the case of *H. & T.C.R. Company v. Johnson*, 41 SWR (2nd) 14, held:

"The provisions of the statutes are such as to make the collection of *those charges a public duty on the part of the carrier, and to incapacitate* the carrier to refund or to remit 'in any manner or by any device' any portion of such charges. Johnson was charged with knowledge of these statutory provisions and of their legal effect. He relied at his peril on the representation that the freight charges had been prepaid; for he was charged with knowledge that the carrier could not by that means evade the public duty, imposed by the statutes, to collect the full amount of charges lawfully due."

The law fixing the rights and duty of a carrier to collect and the shipper to pay the rates as prescribed by the Commission applies both to rail transportation and truck transportation.

In *L. & N. Ry. v. Central Iron and Coal Company* 265 U.S. 59, 68 L. Ed. 900 the correct rule is declared that:

"No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statutes of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor."

In the case of *Herrin Transportation Company v. Marmion*, 113 SWR (2nd) 291, plaintiff sued on a private contract, one that provided for a rate less than the rate prescribed by the Railroad Commission, identical in principle with this case. The carrier insisted upon applying the rate as fixed by the Commission, notwithstanding that he had made a contract with the shipper for a lesser rate. Addressing itself to this private contract that provided for a rate different to the one fixed by the Commission, the court said:

> "The alleged contract was void, and gave no right of action to appellee for its breach. Wardlow v. Andrews, Tex. Civ. App., 180 S.W. 1161; Fort Worth & R.G.R. Co. v. Burns, Tex. Civ. App., 242 S.W. 295, 296; Wichita Falls & W.R. Co. v. Asher, Tex. Civ. App., 171 S.W. 1114."

To like effect see the case of *Central Freight Lines, Inc. v. C. & S. Freight Lines, Inc.*, reported in 125 SWR (2nd) 615. In that case a private contract was entered into between the parties which was never submitted to nor approved by the Railroad Commission and concerning this private contract the court said:

> "The private agreement between appellant and appellee * * * never became binding * * *. It would be a violation of both the letter and spirit of the statute above cited to permit parties by private agreement, unapproved by the Railroad Commission, to restrict the service to be rendered the public under such certificates of convenience and necessity so issued by the Railroad Commission and to enforce such agreements in the district court without joining the Commission as a party thereto,

as was done in this case. It would result in stripping the Railroad Commission of its right to regulate traffic on the highways and would take from it the authority to provide for the convenience of the public in the transportation of freight."

The original application for the contract carrier permit addressed to the Commission was dated August 26, 1940. This application provided:

"Applicant proposes that the tariff to be charged for the services proposed to be rendered will be that as promulgated by the Railroad Commission of Texas."

The original contract between the carrier and the shipper was dated August 26, 1940 (although it was not executed until sometime later), which contract provided in part:

"11. First party agrees to promptly comply with all laws, rules and regulations applicable to the conduct of said business as a contract motor carrier, including and without excluding any other applicable law, rule or regulation, those of the State of Texas and any department or governmental sub-division thereof, all general laws and applicable ordinances or regulations of cities or towns to or through which products of second party may be delivered or transported hereunder." (R. 120.)

"13. It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of

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vs.

GENERAL MILLS, INC., *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, styled *General Mills, Inc., Appellant, v. Leo H. Steele, Appellee,* is not yet reported in the Federal Reports, but may be found in the record filed in this suit. (R. 409 and 466.)

II.

JURISDICTION

This has been stated under subdivision II in the preceding Petition for Writ of Certiorari, to which reference is here made, and, therefore, will not be repeated here.

> rate is that which the carrier must exact and that which the shipper must pay.' Kansas City Southern R. Co. v. Carl, 227 U. S. 639. 'The transaction between the parties amounted to an assumption by the consignee to pay the only lawful rate it had the right to pay or the carrier the right to charge. The consignee could not escape the liability imposed by law through any contract with the carrier.'" (citing many cases)

The court then proceeded to cite the case of *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 83 L. Ed. 953, in which the Supreme Court of the United States said:

> "This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less than the tariff rate. It is equally important to aid the efforts of a carrier in collecting published charges in full. Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates. The lawful rate as established by the rates and schedules filed by the carrier must be collected. (citing cases) The established rates are a matter of public right, and only the running of the statute of limitations can preclude a carrier from recovering the full amount."

California has a statute similar to Texas relating to contract carriers, and in the case of *Gardner v. Rich Mfg. Co.*, 158 Pac. 23, a case involving contract carrier rates where a private contract had been made, the court simply held that the schedule of minimum rates established and prescribed by the rules and regulations

of the Commission became a part of every contract between the carrier and the shipper.

To permit the judgment of the Circuit Court of Appeals to stand, is to set aside and annul the rates fixed by the Commission, and to create the very discrimination and rebates which it is the purpose of the statute to prevent.

The majority opinion failed to take into consideration, or at least it did not even discuss, the public policy of the State of Texas. By its refusal to allow the carrier to collect from the shipper, the court allowed a collateral attack on the orders of the Commission to be sustained and allowed the shipper to establish its own rate different to that of the Railroad Commission. Thus the court in this method placed its stamp of approval upon a transaction which it declared to be void and illegal. This decision by the majority opinion of the Fifth Circuit Court on this point is the only one of its kind that we have been able to find in any jurisdiction, state or federal, by any court. We invite this court's attention to the dissenting opinion of Justice Hutcheson, and particularly that portion where he said:

> "But if I could agree that there was a deliberate intent to defraud the statute, I still could not agree with the majority, whether plaintiff's suit is to be regarded as on the written contract which was exhibited to and filed with the Commission, or on the right arising out of the statute to recover the legal charges for the services rendered, for the right to recover the legal charges and no other rests on an overriding public policy. This policy is so imperative that it may not be defeated by the

conduct of the parties in entering into legal and evasive arrangements which it is the very purpose of the policy to strike down. * * * It seems clear to me that plaintiff's suit is on the contract, which the parties made and exhibited to the Commission, and in which they agreed to pay the legal rates, and that the case is ruled by Central Freight Lines v. C & S Motor Freight Lines, 125 SWR (2nd) 615."

RIGHT AND DUTY OF CARRIER TO THE LEGAL RATE

We respectfully submit that the Texas law is mandatory, that the shipper must pay and the carrier must collect the rates as fixed by the Railroad Commission as established by the authorities above cited as they relate to shipments by the truck carriers and rail carriers. The same rule applies to the insurance companies of Texas as stated in the case of *Brown & Root v. Traders & General Ins. Co.*, 135 SWR (2nd) 534, wherein it was said:

"A carrier of workmen's compensation insurance and its policy-holder necessarily contract with each other that the premium rate shall be the duly and lawfully prescribed rate for the risk involved, and none other. They are without power by contract, or otherwise, to alter such prescribed rate. So, if the parties may not consciously and intentionally change the lawfully prescribed rate, their knowledge, ignorance, or negligence is equally incompetent to work any such change. Therefore, the collection by the insurer of a higher or lower rate than that which is duly and lawfully prescribed

for the risk involved constitutes a breach of the insurance contract for such insurer to collect only the duly prescribed rate. And, of course, a suit for reparation for overcharges or undercharges is simply and purely a legal action, with no question of reformation of contract, or other equity involved in it. In other words, *if a carrier of workmen's compensation, for instance, had collected a lower premium rate than was lawfully prescribed for carrying the risk involved, and later discovered such error, it would certainly not have to prove that it was not negligent in collecting the unlawful rate, in order to entitle it to collect the only rate which the law authorized or permitted it to collect;* neither would it be necessary for such insurer to have the policy of insurance reformed to specify such lawful rate, for the contract by force of law intends that the premium rate, and only the premium rate, which applies to carrying the risk involved is agreed rate."

In the majority opinion we find the following statement:

"The statute does not expressly authorize a suit for the recovery of the prescribed rates by anyone * * * In the instant case the statute was not for the benefit of contract carriers but for the benefit of common carriers."

Therefore, the majority conclude that there was no right nor duty on the part of the contract carrier to collect the rates as prescribed by the Commission.

The Texas Statute relating to Railroads

"does not expressly authorize a suit for the recovery of the prescribed rates by any one, etc."

Yet we call attention to the uniform holdings of the Texas courts that the rail carriers not only have the right but the public duty to prosecute such suits. (See authorities above cited.)

The Insurance Statute of Texas "does not expressly authorize a suit for the recovery of the prescribed rates by any one, etc." Yet the Fifth Circuit Court in *Battles v. Braniff Airways*, 146 Fed. (2nd) 336, and *Bowen Motor Coaches v. New York Casualty Company*, 139 Fed. (2nd) 332, have held that such suits may be maintained. Furthermore in the Herrin Transportation Company case, above, relating to a truck carrier the statute "does not expressly authorize, etc." Yet the court applied the rates as fixed by the Railroad Commission. The complete answer to this strange pronouncement of the Circuit Court of Appeals is found in Section 22b, Article 911b which declares the public policy for *all* motor carriers. The Legislature made no distinction between common carriers and contract carriers. The Texas courts have made no distinction between common carriers and contract carriers. The same rule applies to both. The attempt by the Circuit Court to make a distinction finds no support in Texas, but on the contrary the statute declares the same rule for all carriers.

The law of Texas is binding on the Federal Courts.

> "The source of substantive rights enforced by a federal court under diversity jurisdiction is the law of the state, and whenever that law is authoritatively declared by a state, whether by the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the

forum of the application is a state or a federal court, and whether the remedies be sought at law or may be had in equity." Guaranty Trust Co. of N. Y. v. York, N. Y., 1945, 65 S.Ct. 1464, 89 L. Ed.....

ARGUMENT

(Specifications of Error 5, 6, 7, 8, and Second Law Question)

The Circuit Court of Appeals held that the carrier could not recover from the shipper because the parties were in pari delicto. This decision by the Circuit Court is contrary to the Texas law, and completely overlooked the fact that the carrier was not required to rely upon this second contract to make out his case. The carrier did not seek nor require the aid of this second contract which was brought in by the shipper who by its use collaterally attacked the legal freight orders of the Commission. An early Texas case, namely *Beer v. Landman*, 88 Tex. 450, announced the law in Texas, wherein the Supreme Court held:

> "The plaintiff cannot recover whenever it is necessary for him to prove as part of his cause of action, his own illegal contract or other illegal transaction, but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear and may be important even as explanatory of other facts in the case, he may recover."

In the instant case the carrier was not obliged to prove his own illegal act, that is, the second contract. He relied entirely upon the first contract and the orders

of the Railroad Commission. If there had been no written contract at all between the shipper and the carrier in this case "the law writes the particular rate fixed and authorized by the Railroad Commission of Texas" into every contract of shipment. (*Texas C. Ry. Co. v. Kerns*, 108 SWR 187). There was no escape from this lawful rate, and this second contract could not change the law of Texas, although the effect of the decision of the Circuit Court is that such second contract—though void—should prevail. For a review of the authorities of Texas on this question we refer to the case of *Hall v. Edwards*, 222 SWR 167. Likewise to the more recent case of *Morrison v. City of Fort Worth*, 155 SWR (2nd) 908, in which the Supreme Court was passing on a case where a private contract had been made contrary to the statutory enactments of the Legislature. In 1937 the Legislature of Texas enacted a law fixing a minimum wage scale for working hours for firemen and policemen in certain cities of the State, including Fort Worth. After the law was enacted the City entered into a contract with its firemen for a lesser rate. One of the firemen, who had signed this private contract and who had worked under it for some months, died, and several months later his widow filed suit to recover the difference between the amount paid under the private contract and the amount that should have been paid in accordance with the statutory enactment. The Supreme Court said:

> "In order to establish her cause of action the plaintiff requires no aid from the illegal contract. Under such a record, the illegal contract constitutes no bar to the plaintiff's cause of action. This is be-

cause of the settled rule in this State that, even though a demand is in some way connected with an illegal transaction, still recovery may be had if the plaintiff requires no aid from the illegal transaction to establish his case. Oliphant v. Markham, 79 Tex. 543, 15 S.W. 569, 23 Am. St. Rep. 363; Beer v. Landman, 88 Tex. 450, 31 S.W. 805; Hall v. Edwards, Tex. Com. App., 222 S.W. 167."

The Circuit Court stated that the Federal Law applicable to this case had been announced in the case of *Spring Company v. Knowte*, 103 U. S. 49. An examination of this case will disclose (1) that it was not a rate case, but one concerning the increase of a capital stock of a corporation which the defendants in error conceded that the plan adopted by the company to increase such stock was in violation of the law of the State of New York, and (2) that the plaintiff was required to rely upon the illegal transaction to make out his case. Therefore, it has no application to the case at bar.

For authority in Texas the Circuit Court relied solely upon *Wright v. Wight & Wight*, 229 SWR 881, in which case the court announced the same rule as in the Beer v. Landman case and Morrison case, above, but denied recovery to the plaintiff because the plaintiff was compelled to depend upon the illegal contract to make out his cause of action, while in the instant case, the carrier does not depend upon nor does he seek the aid of the illegal contract to make out his case. Furthermore, in Wright v. Wight & Wight there was no question of public interest. The public interest was not involved. The question was not even pleaded nor considered, while in the instant case the learned trial judge

in his Findings of Fact and Conclusions of Law (R. 88) points out at great length wherein the matter of rates for contract carriers does affect the public interest. In connection with the trial court's Findings of Fact (R. 88-94) and his Conclusions of Law (R. 94-99) and likewise the peremptory instruction of the court (R. 375) we find the trial court has rendered an exhaustive opinion and has completely covered all of the facts. The point upon which the Circuit Court reversed and rendered judgment in this case was not even raised in the trial court. Whether or not a party is violating the criminal laws certainly involves the question of intent as does the question as to whether he is engaging in a corrupt scheme. In any investigation of a criminal act it is a question of fact as to what the parties intended. It certainly cannot be said that the undisputed evidence shows beyond the point where reasonable minds could disagree, that the parties were deliberately violating criminal statutes and engaging in a corrupt scheme. If such issue were in the case it should have been submitted to the trial court and either he or the jury should have been requested to find the facts with respect thereto.

The majority of the Circuit Court of Appeals found:

> "It also is without serious doubt that the substituted paragraph 13, suggested and drawn by Plaintiff's counsel, and setting forth the provision that the applicant would charge the rates fixed by the Commission, was clearly a subterfuge, adopted in order to get by the Railroad Commission, for it was definitely understood that after the permit was obtained this provision would be eliminated

> and the provision which the Appellee now says was illegal, to wit, the provision to pay his expense, plus ten per cent, would be put back into the contract."

This question was not found by the trial court, was not at issue and no request was made to find on it, and the Circuit Court of Appeals was without jurisdiction so to find.

The Circuit Court of Appeals also found:

> "There was but one contract that spoke the actual intent and agreement of the parties, and that was the amended contract under which all of the services were performed.
>
> "We also think that the inserted provision for the payment of such rates as the Commission should fix was a mere subterfuge that was never a part of the real agreement, intent, or purpose of the parties.
>
> "The provision for payment under rates and rules of the Railroad Commission so taken out and discarded never was intended to be, and, therefore, never was, in fact or in law, the agreement of the parties."

These facts were not put in issue, no findings of fact made, and none requested on these issues, and the Circuit Court of Appeals was without jurisdiction to find them as a basis for its judgment entirely different from that of the trial court. Neither party requested any such issues to be submitted and none were submitted and no such findings made.

The very fact that one member of the Circuit Court

> Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission for the kind and character of service to be rendered hereunder." (R. 120-121.)

Based upon the application, which was supported by the contract, the Commission granted its Contract Carrier Permit No. 11449 (R. 130). This permit was based upon an order issued by the Commission dated June 16, 1941 (R. 125). The order and the permit issued by the Commission made applicable to that particular permit the minimum rates prescribed for contract carriers. Therefore, the general rate order of the Commission was made specific as it related to the carrier and the shipper under this particular permit. The rate orders as promulgated by the Commission are binding on both carrier and shipper as was stated in the case of *West Texas Compress & W. Co. v. Panhandle & S. F. Ry. Co.* 15 SWR (2nd) 558, "the rates promulgated by the Commission have the same force as a like enactment of the Legislature itself." Likewise all rate orders promulgated by the Commission are written into and become a part of every shipment that is made. Such was the holding in the case of *Texas C. Ry. Co. v. Kerns*, 108 SWR 187, wherein the court said:

> "In every contract of shipment in this state the law writes the particular rate fixed and authorized by the Railway Commission of Texas."

Article 911b, Vernon's Annotated Statutes, Section 1 through 22 (the material parts thereof may be found in the Appendix attached hereto) provide for both com-

mon and contract carrier truck operations over the highways of Texas. Article 6aa thereof provides that the Commission shall prescribe rates for contract carriers, and this court has already had occasion to pass on the authority of the Commission to promulgate rates under said section in the case of *Stephenson v. Binford*, 287 U. S. 251, 77 L. Ed. 288, as follows:

> "What has just been said applies in the main to the other challenged provision authorizing the commission to prescribe minimum rates not less than those prescribed for common carriers for substantially the same service. This provision, by precluding the contract carriers from rendering service at rates under those charged by the railroad carriers, has a definite tendency to relieve the highways by diverting traffic from them to the railroads. The authority is limited to the fixing of minimum rates. The contract carrier may not charge less than the rates so fixed, but is left free to charge as much more as he sees fit and can obtain. Undoubtedly, this interferes with the freedom of the parties to contract, but it is not such an interference as the Fourteenth Amendment forbids. While freedom of contract is the general rule, it is nevertheless not absolute but subject to a great variety of legitimate restraints, among which are such as are required for the safety and welfare of the state and its inhabitants. (Citing cases.)" * * *
>
> "We need not consider whether the act in some other aspect would be good or bad. It is enough to support its validity that, plainly, one of its aims is to conserve the highways. If the legislature had other or additional purposes, which, considered apart, it had no constitutional power to make effective, that would not have the result of making the

> act invalid. Ellis v. United States, 206 U.S. 246, 256, 51 L. Ed. 1047, 1052, 27 S. Ct. 600, 11 Ann. Cas. 589. Nor does it matter that the legislation has the result of modifying or abrogating contracts already in effect. Such contracts are to be regarded as having been made subject to the future exercise of the constitutional power of the state.

With the law in Texas so firmly established the shipper in this case, a Delaware corporation, came to Texas in search of a contract carrier who would haul a small portion of its commodities, and said shipper required its carrier "to promptly comply with all laws, rules and regulations applicable to the conduct of said business as a contract motor carrier, including and without excluding any other applicable law, rule or regulation, those of the State of Texas and any department or governmental sub-division thereof" * * * and to pay "tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission for the kind and character of service to be rendered hereunder." (R. 120.) Then after having 424,919,582 pounds of its freight moved over Texas highways the said shipper proceeded to pay therefor only $44,804.33, when under the minimum Texas contract carrier rates the carrier should have been paid $77,814.98. Then the shipper came into the United States District Court and pleaded as a defense to the lawfully prescribed rate that it had entered into a second contract with the carrier for a rate less than the one fixed by the Commission, and therefore made a collateral attack upon the orders

of the Railroad Commission and said that it should not be required to pay such lawful rates because it had entered into an illegal and void contract—thus placing itself in pari delicto with the carrier with reference to the second contract. There can be no question that the defense as urged in this case was a collateral attack. *Texas Steel Co. v. Fort Worth & Denver*, 40 SWR (2nd) 78. See also *Railroad Commission v. Interstate Motor Freight*, 77 SWR (2nd) 1100; *Alpha Petroleum Company v. Terrell*, 59 SWR (2nd) 364. It should be kept in mind that this second contract was executed in Oklahoma City, Oklahoma (R. 208). Also this second contract was never submitted to nor approved by the Commission (R. 244, 245).

An interesting case from the State of Massachusetts, which has a motor carrier statute almost identical with that of Texas, is that of *Papetti v. Alicandro*, 58 NER (2nd) 155, in which case the contract carrier, who later changed to a common carrier, contracted with the shipper to charge a rate as promulgated by the Commission and did charge such rate. After the collection of the rate, by private contract the carrier rebated to the shipper the cash according to the terms of the private contract. After discussing the facts and the law at great length the court held:

> "Unless the plaintiff is prevented by some rule of law, he is entitled to maintain this action. We think that the plaintiff not only is not so barred, but that it is both his right and duty to recover the rebates. * * * 'Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful

understand the majority opinion of the Circuit Court of Appeals in its decision in this case attempts to distinguish it from those two cases on the ground that here there was a corrupt and criminal scheme and the parties were in pari delicto and therefore the public policy which ordinarily prevents either party from recovering under the contract supersedes and is of greater importance than the public policy which will permit parties in pari delicto to sue on the contract where the public welfare would best be served by permitting such suit to be maintained.

Section 571 of the Texas Penal Code provides that:

> "Whoever violates any provision of the laws of this State regulating the business of life, fire, or marine insurance, shall, where the punishment is not otherwise provided for, be fined not less than five hundred nor more than one thousand dollars."

Article 4894, Revised Civil Statutes, is an insurance statute on rebating and discrimination and makes such an offense under the insurance law. Therefore, the insurance cases were clear violations of the Penal Code of Texas.

In *Federal Life Insurance Company v. Hoskins*, 185 SWR 607, a contract was made in direct violation of these statutes and suit was defended on the ground of such violation and allegation of pari delicto. The court allowed a recovery.

The Insurance Statute of Texas "does not expressly authorize a suit for the recovery of the prescribed rates by any one, etc." Yet this same Fifth Circuit Court did allow a recovery. Likewise, in the two cases on insur-

ance above cited from Texas this same Fifth Circuit Court held that the pari delicto doctrine could not apply when the public interest was involved. Yet, in the instant case we find this Fifth Circuit Court completely ignoring the question of public policy and completely ignoring and refusing to consider the fact that the carrier in the instant case was not required to nor did he rely upon any part of this second contract. The majority opinion of the Circuit Court in this case is directly in conflict with a decision by the same court in an opinion rendered by Judge McCord in the case of *Standard Rice Co. v. Southern Pac. Co.*, 139 Fed. (2nd) 93, wherein the court said:

> "The mistake of plaintiff in quoting to defendant the 26 cent rate and which was not applicable can avail defendant no relief. It must pay the applicable rate, the lawful rate. All shippers stand equal under this tariff law of the carriers. The rate measured here to defendant as applicable is and must be the same and the exact rate measured to every other shipper who finds himself confronted with the same facts and conditions." * * *
>
> "Manifestly, the defendant has not been damaged by failure of the carrier to quote to it the applicable rate. Atlantic Coastline Railroad Co. v. Briston Steel & Iron Works, D.C., 30 F. Supp. 726; Texas & Pacific Railway Co. v. Mugg & Dryden, 202 U.S. 242, 26 S.Ct. 628, 50 L. Ed. 1011; Gulf, C. & S.F. Railroad Co. v. Hefley, 158 U.S. 98, 15 S.Ct. 802, 39 L. Ed. 910; Illinois Central R. Co. v. Henderson Elevator Co., 226 U.S. 441, 33 S.Ct. 176, 57 L. Ed. 290; Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853, L.R.A. 1915E, 665."

CONCLUSION

The Attorney General General of Texas filed an able brief as amicus curiae in the Circuit Court and he has filed or will file a similar brief in this court wherein he has pointed out the public policy of Texas and the public interest. Likewise, the Attorney General has pointed out the far reaching and disastrous result of the decision of the Circuit Court in this case. Justice Joseph C. Hutcheson, Jr., an experienced Texas lawyer and District Judge for many years on the Fifth Circuit Court writes an able dissenting opinion. We respectfully submit that his dissenting opinion concerning the public policy of Texas is entitled to great weight.

It is the position of the petitioner in this case that (1) a carrier cannot be incapacitated or estopped from collecting the minimum freight rates prescribed by the Railroad Commission, and (2) that so long as a carrier is not required to rely upon or seek the aid of an illegal contract of which he was a party, that the doctrine of pari delicto cannot apply and that the overriding public policy should prevail.

Respectfully submitted,

LEO H. STEELE
By:
CECIL A. MORGAN
T. S. CHRISTOPHER
First National Bank Building
Fort Worth, Texas
Attorneys for Petitioner

CULBERTSON, MORGAN, CHRISTOPHER & BAILEY
First National Bank Building
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Of Counsel

CERTIFICATE OF SERVICE

I, T. S. Christopher, attorney of record for petitioner, Leo H. Steele, hereby certify that a copy of the foregoing Petition for Writ of Certiorari and Brief in Support Thereof, has been served upon Charles E. France and the firm of Miley, Hoffman, France & Johnson, whose post office address is First National Bank Building, Oklahoma City, Oklahoma, and Alfred McKnight and the firm of Cantey, Hanger, McMahon, McKnight & Johnson, whose post office address is 1500 Sinclair Building, Fort Worth 2, Texas, attorneys of record for respondent, General Mills, Inc., by personally delivering two copies thereof to Alfred McKnight, one of the attorneys and a member of the firm of Cantey, Hanger, McMahon, McKnight & Johnson, on this 2nd day of April 1946.

.....

T. S. CHRISTOPHER
Attorney for Petitioner

I, Alfred McKnight, one of the attorneys of record for respondent General Mills, Inc., hereby acknowledge receipt of two copies of the foregoing Petition for Writ of Certiorari and supporting brief this 2nd day of April 1946.

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ALFRED McKNIGHT
Attorney for Respondent

APPENDIX "A"

In The

UNITED STATES CIRCUIT COURT OF APPEALS

For the Fifth Circuit

No. 11313

GENERAL MILLS, INC., Appellant,

versus

LEO H. STEELE, Appellee.

Appeal from the District Court of the United States for the Northern District of Texas.

(January 8, 1946.)

Before HUTCHESON, WALLER, and LEE, Circuit Judges.

WALLER, Circuit Judge: Appellee agreed to transport, as a contract motor carrier, the merchandise of Appellant for a period of three years, in an area having a radius of 150 miles, for the compensation of his actual expenses plus ten per cent. He performed his agreement until it was lawfully terminated three years later. There was in effect at the time of the making of this agreement, and during the entire three years, a statute, and an order of the Railroad Commission of

Texas, providing that the rates which a contract motor carrier, in competition with a common carrier, could charge should not be less than the minimum rates that a common carrier, performing substantially similar services, could charge.

Before Plaintiff could engage in the business as a contract motor carrier it was necessary for him to make application to, and secure a permit from, the Railroad Commission. In the application for such permit it was at least appropriate, and perhaps requisite, that the applicant should exhibit the contract under which he proposed to engage in such carriage. In conformity with the understanding between the parties, a proposed contract was prepared by Appellant, in which Sec. 13 provided that for such transportation of the Defendant's merchandise the Plaintiff would receive his actual expenses, plus ten per cent. But when this contract was submitted by Mr. Steele to Mr. Morgan, one of his attorneys, the latter, on February 28, 1941, wrote Mr. Steele as follows:

"Dear Mr. Steele:

"Since you left this morning, I have again carefully considered the proposed contract to be entered into between you and General Mills.

"Paragraphs 13, 14, 15, 16 and 17, which are set forth on pages 4 to 7, are in direct conflict with the statutes of the State of Texas and therefore they must be eliminated from the contract. In lieu thereof the following paragraph should be inserted:

" 'It is mutually agreed between the parties that the rate to be charged by the first party and

paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission.'

"Therefore, we recommend that your contract be rewritten whereby you delete the paragraphs above listed and insert in lieu of the above.

"Very truly yours,
"(Sgd.) CECIL A. MORGAN.

"Mr. Steele:

"P. S. A custom has long prevailed in this state that contract carriers must carry such provision as outlined in the letter to which this is attached relating to rates and charges. Then after the contract carrier certificate has been issued the contract carrier and shipper work out their own arrangements. Therefore there is very little for your company to be concerned about regarding this change.

"Very truly yours,
"(Sgd.) CECIL A. MORGAN.
"Special delivery."

On March 27, 1941, Mr. Colfix, the Division Comptroller of General Mills, Inc., after Mr. Steele had shown him Mr. Morgan's letter of February 28, wrote an interoffice communication[1] to Mr. Steele, who was

[1] "March 27, 1941.

"Mr. L. H. Steele,
Wichita Falls.
"Mr. L. B. Colfix,
Oklahoma City.

"You received a letter from your attorney, Mr. Morgan, in which he recommended certain changes in the contemplated contract to be entered into between you and General Mills. The principal change

then an employee of the Defendant, in which he stated, among other things, that if the substitution of the paragraph as suggested by Mr. Morgan were made:

> "It would appear from this that if we are to live up to the contract that the basis of charges you would make to us would be the rate specified by the Railroad Commission. McCraney had the idea that the Railroad Commission might not promulgate any rates. In that case we would have to have a charge not in conformity with the contract, which might cause difficulty."

On April 3, 1941, Mr. Christopher, a law partner of Mr. Morgan, and one of counsel for the Plaintiff, wrote Mr. Colfix, Division Comptroller for Defendant, stating among other things:

> "For your information and the basis upon which Mr. Morgan's recommendation was made with reference to the paragraph pertaining to rates, the Texas law (Article 911b Vernon's Annotated

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has to do with the method of compensation for trucking services, and it is recommended by Mr. Morgan that the compensation be specified in the contract as follows:

"'It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission.'

"It would appear from this that if we are to live up to the contract that the basis of charges you would make to us would be the rate specified by the Railroad Commission. McCraney had the idea that the Railroad Commission might not promulgate any rates. In that case we would have to have a charge not in conformity with the contract, which might cause difficulty.

"I think before we can give further consideration to this form of contract we should know definitely what kind of rates, if any, have been established by the Railroad Commission. Is there any way you can find out what factors they use in determining their rates and to what extent they may be expected to assign rates and when and if your permit is approved?"
"LBC/FH"

Civil Statutes 1925) provides as follows:

"'The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service.'

"From the foregoing, you will see that the Statute itself fixes the rate to be charged by contract carriers as 'not less than the rate prescribed for common carriers for substantially the same service.'"

Mr. Christopher then concludes this letter as follows:

"I believe this fully answers your question, but if there are other questions we shall be pleased to answer them, and further than that I might make some valuable suggestions to Mr. Steele or to yourself with reference to this matter the next time Mr. Steele is in the office."

On April 5 Mr. Colfix wrote another interoffice communication to Mr. Steele, suggesting that the latter make arrangements for them to meet with Mr. Christopher at Fort Worth at an early date. This conference was held and concerning what occurred the testimony of Mr. Colfix is undisputed. He testified that:

"I indicated to these gentlemen that the form of contract that they proposed to us was entirely different than the understanding that Mr. Steele

and our company had as to the financial arrangements for compensation, and I attempted to determine from them whether or not this contract was first, legal, and second, whether or not it would make possible the type of financial arrangement that we wished, and they assured me, first, that in order to get a permit it was necessary to put in the standard clause and that the Railroad Commission had never prescribed rates for this type of service, and it was their opinion that such rates would never be prescribed; that we could go ahead and make this form of contract and then before we started our operations that we could legally execute a supplemental contract for the type of service that would be rendered by Steele for us."

On April 11, 1941, a letter from Mr. Christopher to Mr. Colfix stated:

"It is absolutely necessary so far as obtaining the grant of the contract carrier permit is concerned that the contract between General Mills and Mr. Steele recite that the charges to be made will be such charges as have been prescribed by the Railroad Commission of Texas, * * *."

Mr. Christopher further stated in this letter:

"It is my thought on this matter that it should be entirely agreeable with you to make the contract as is proposed by Mr. Steele now in your possession, and that thereafter and after the contract carrier permit is granted, if it is granted, and after you have had some experience with the operation that it is going to be necessary and entirely proper under the law that some supple-

of Appeals disagrees to the point of dissenting, clearly shows that reasonable minds can disagree as to whether these conclusions can be properly drawn from the evidence. The worst that can be said about all of these questions is that they might provoke fact issues if properly raised, and if they are material to a determination of this case, then such fact questions were for the trier of the facts to determine, but the Circuit Court of Appeals has no jurisdiction to substitute its findings of fact for that of the trial court, and to render its judgment based upon its own independent findings of fact. *Seely Oil & Gas Co. v. RRC*, 128 Fed. (2nd) 334.

The point on which the Circuit Court of Appeals reversed and rendered judgment was not even raised in the trial court.

We respectfully submit that the majority opinion of the Circuit Court decided this case upon issues that were not even considered by the trial court. However, if the Circuit Court had applied the correct rule of law in Texas such fact findings on the part of the Circuit Court would have been immaterial. Even if true, which we deny, still such facts would not have prevented a carrier in Texas from collecting the minimum rate prescribed by the Railroad Commission for transportation services.

But we contend that the Circuit Court of Appeals had no jurisdiction to find facts not found by the trial court and not raised by the pleadings nor the evidence and not found from the undisputed evidence in the case, to sustain its conclusion that there was a corrupt and criminal scheme. In the first place the parties are

presumed to have proceeded in a legal manner. This requires no citation of authority. This presumption of the Texas law must be followed by the Federal Court sitting in Texas. *Cities Service Oil Co. v. Dunlop*, 84 L. Ed. 196, 308 U. S. 208. We believe that the Circuit Court of Appeals was without authority to find any such facts as it did in the instant case. *Union Bleachery v. U. S.*, 79 Fed. (2nd) 549; *North American Acc. Ins. Co. v. Anderson*, 100 Fed. (2nd) 452; *McGee v. Nee*, 113 Fed. 2nd) 543.

As was said by this court in *Louisville & N.R. Co. v. Central Iron & C. Co.*, 265 U. S. 59, 68 L. Ed. 900: "No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges."

To like effect see *P.C.C. & St.L.R. Co. v. Fink*, 250 U.S. 577, 63 L. Ed. 1151, where this court held that it made no difference whether the contract for a different rate was made in good faith or bad faith, the result was the same.

We now refer to the conflict between the decision of the Circuit Court of Appeals in this case and its decisions in *Battles v. Braniff Airways*, 146 Fed. (2nd) 336, *Bowen Motor Coaches v. New York Casualty Company*, 139 Fed. (2nd) 232. We can see no valid distinction between this case and the two decisions of the Circuit Court of Appeals from Texas on the insurance law. The two Texas cases decided by the Circuit Court of Appeals were cases where contracts were made for the purpose of obtaining a lower rate than that fixed by the Insurance Commissioner of the State of Texas. We

mental contract be entered into based upon the service rendered."

Mr. Christopher further stated:

"Personally I do not believe that there will be any element of violation of the law involved if subsequently some additional contract is entered into supplemental to the original contract adjusting the rates based upon experience and the service actually rendered in comparison to service of common carriers. To me, however, it is simply a reasonable business risk, if it is a risk, which you can afford to take."

On April 17, 1941, the Defendant, by Mr. Colfix, wrote Mr. Christopher, stating, among other things, that:

"After full consideration of the matter our attorneys are of the opinion that it is quite in order for us to make this type of contract and later have a supplemental agreement for costs as may be agreed upon between Mr. Steele and General Mills."

The real intention of the parties for compensation to Mr. Steele by the payment of expenses, plus ten per cent, was, upon the suggestion, advice, and assurance of the attorneys for Mr. Steele, withdrawn and paragraph 13, as drafted and suggested by Mr. Morgan, was inserted in the writing to be submitted to the Railroad Commission. The inserted paragraph is as follows:

"13. It is mutually agreed between the parties that the rate to be charged by the first party and

paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission for the kind and character of service to be rendered hereunder."

The permit was granted to Mr. Steele on July 9, 1941, and on July 31, 1941, the amendatory contract, as contemplated and agreed upon, was executed between Appellant and Appellee, in which paragraph 13 of the prior instrument was amended so as to put into effect that which had been the real agreement all along, namely, to pay the plaintiff his expenses, plus ten per cent for the services to be rendered.

The testimony of Mr. Colfix, the letters aforementioned, the fact that the original contract of August 26, 1940, was promptly amended after the permit was granted, and the fact that Mr. Steele was compensated on the basis of the original agreement for the entire three years, during which there was never any protest from him that it was not in accord with the understanding and agreement of the parties, all show beyond doubt that paragraph 13, as suggested and drafted by Mr. Morgan and inserted in the contract submitted to the Railroad Commission, was never intended to, and did not then, theretofore, or thereafter, express the true agreement of the parties. However, Mr. Steele knew and carried out the actual understanding and performed the services during the

entire period under the re-amended contract, and accepted without protest the agreed compensation of expenses, plus ten per cent. The conclusion is inescapable that the intent and purpose of substituting paragraph 13, as drafted by Mr. Morgan, in lieu of the real agreement, was not to express the intent and agreement of the parties but to serve as an aid in procuring a permit for the Plaintiff from the Railroad Commission. This substitution of paragraph 13 was nothing more nor less than a subterfuge.

It cannot be effectively contended that the contract sued on by the Plaintiff, to-wit, the so-called contract of August 26, 1940, was, in fact, the contract or agreement of the parties, for it appears beyond doubt that the real contract between the parties was the contract of August 26, 1940, as amended by striking out Mr. Morgan's paragraph 13 and reinstating the paragraph that truthfully set out the compensation that the parties had agreed would be paid Steele. This occurred on July 31, 1941. Nevertheless, upon the termination of the contract Mr. Steele, represented by the same attorneys who had advised the entering into of the contract, brought suit against General Mills, Inc., asserting that the agreement for Steele to charge, and for General Mills to pay, less than the minimum rates payable under the Texas statute and the orders of the

Sec. 6-aa, Article 911b, Texas Revised Civil Statutes, is as follows:

"The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

Railroad Commission[3] to a common carrier performing similar services was illegal and void.

Although Mr. Christopher advised General Mills on April 11, 1941, that he did not believe there would be any element of violation of law involved if subsequently some additional contract was entered into in adjusting the rates, based on experience and service rendered, and added, "it is simply a reasonable business risk, if it is a risk, which you can afford to take," there is no intimation or suggestion in the record of any purpose at that time to entrap the Defendant into the situation into which Plaintiff now seeks to cast it.

The Defendant contended, in defense, that under Section 6-aa of Article 911b of the Texas Revised Civil Statutes the Railroad Commission had the right only to fix the minimum rates for contract carriers which were in competition with common carriers and which were performing substantially the same service, and that it was not performing such service, nor in such competition; that although the Railroad Commission had provided by general order that the rates charged by contract carriers should not be less than the minimum rates charged by common carriers, nevertheless, such rate could be made applicable only upon a specific finding by the Railroad Commission that the particular contract carrier was in competition with, and performing substantially the same service as, a common carrier; that under Section 6-aa of Article 911b, *supra*, the Railroad Commission was not authorized by the

[3] General Order No. 5, Texas Railroad Commission, provides that: "The rates, rules, and regulations in this tariff, or as may be amended, shall be observed * * * (B) by contract motor carriers as a minimum, on Texas intrastate traffic, unless permits issued by the Commission provide to the contrary."

statutes of Texas to prescribe minimum rates for contract carriers who were not performing substantially similar services to, and who were not in competition with, common carriers; that if Section 6-aa of Article 911b, *supra*, undertakes to delegate such authority to prescribe the minimum rate for all contract carriers whether engaged in competition with common carriers or not, it would be unconstitutional; that the Railroad Commission is a body having a limited jurisdiction under the statute and that any order made within the scope of such statute must affirmatively show that the jurisdictional requisites were present, and in the absence thereof, if the order of the Railroad Commission was intended to apply to the contract operations of the Appellee, then it is void on its face; that the special findings of the jury in the present case that the Appellee was not engaged in rendering substantially similar services to those of a common carrier, and its finding that the Appellee was not engaged in competition with any common carrier, which special verdicts were never set aside, rendered it necessary for the Court to have entered judgment in favor of the Appellant in the light of the asserted insufficiency of Section 6-aa of Article 911b, *supra*, to confer power upon the Railroad Commission to fix rates for a contract carrier not in such competition nor in the rendition of substantially similar services; that as a matter of fact the operations of Appellee were not similar to, nor in competition with, any common carrier; that the Railroad Commission made findings of fact which expressly and impliedly negatived the existence of competition between Plaintiff and common carriers in the services author-

ized to be performed by the permit; that if the contract between Appellant and Appellee was in violation of the Texas Statute as contended, then the parties are in *pari delicto* and the Court should leave them where it found them; that there has been a full settlement and an account stated between the parties; that the Appellee is estopped from maintaining this suit; that the statute of limitations has run against any part of the claim accruing more than two years prior to the institution of the suit.

The jury made negative answers to both of the following special issues submitted to it:

> "First: Do you find from a preponderance of the evidence in this case that the operations of plaintiff Steele under his contract with defendant, were in competition with common carriers over the highways of Texas?
>
> "Second: Do you find from the evidence in this case that plaintiff Steele rendered substantially the same service as that rendered by common carriers, during the time and in the area of transportation herein involved?"

Nevertheless, the Court thereafter peremptorily instructed the jury to find for the Plaintiff, and a judgment for Plaintiff in the sum of $37,884.82 was entered against Defendant.

We will not enter into a discussion of the question of whether or not the Railroad Commission was without authority to fix the rates of a contract carrier without first determining whether or not it was in competition with, and performing services substantially sim-

ilar to, a common carrier, nor the related question as to whether Section 6-aa, without making same applicable to contract carriers in competition with common carriers, is unconstitutional and void, for we agree with Appellee that the supplemental contract to pay rates less than those provided by the Railroad Commission was void, but we think that even so, the judgment should have been against him.

Appellee sued on the statute and the writing that was prepared for presentation to the Railroad Commission, with Mr. Morgan's paragraph 13 therein, which provided for payment to Appellee according to rates and rules of the Railroad Commission, but the evidence is without dispute that paragraph 13 of this alleged contract was never intended by the parties to be a part of the real contract, and was never the basis of payment during the three years of the service. It also is without serious doubt that the substituted paragraph 13, suggested and drawn by Plaintiff's counsel, and setting forth the provision that the applicant would charge the rates fixed by the Commission, was clearly a subterfuge, adopted in order to get by the Railroad Commission, for it was definitely understood that after the permit was obtained this provision would be eliminated and the provision which the Appellee now says was illegal, to-wit, the provision to pay his expenses, plus ten per cent, would be put back into the contract.

Nevertheless, the writing of August 26, 1940, is sued on here without mention of the amendment of July 31, 1941, reinstating the original and real agreement of the parties as to the compensation to Steele.

There was but one contract that spoke the actual intent and agreement of the parties, and that was the amended contract under which all of the services were performed.

Appellee says that this provision in the supplemental contract for the payment of Steele is void, and he ignores the fact that it is a part and parcel of the only contract on which he can declare. A contract modified before there was any performance takes the place of the original one, and consists of the new terms and any provisions of the original contract which the parties agree shall remain unchanged. Steele performed and was paid under the modified contract and a party cannot take the benefits of the modifying stipulations and at the same time repudiate their burdens. See 10 Tex. Jur., §207, page 365.

We think with Appellee that the so-called supplemental contract was void, but we also think that the inserted provision for the payment of such rates as the Commission should fix was a mere subterfuge that was never a part of the real agreement, intent, or purpose of the parties; but that even if it had been *bona fide* and genuine when the instrument was amended prior to any performance, such amendment eliminated the spurious paragraph 13 and became as much a part of the contract as did any other paragraph thereof, and whatever there is of illegality in the method of payment is a part and parcel of the only contract between the parties. The provision for payment under rates and rules of the Railroad Commission so taken out and discarded never was intended to be, and, there-

fore, never was, in fact or in law, the agreement of the parties.

Moreover, when General Mills and Steele agreed to the insertion of paragraph 13, as suggested and drawn by Mr. Morgan, for the sole purpose of getting by the Railroad Commission, well knowing that such a provision was not to be a permanent part of the contract and that it was not expected to be retained or complied with, they committed a fraud upon the lawfully constituted officials of the State of Texas, viz., the Railroad Commission. The conclusion seems inescapable that both parties knew full well that this was a subterfuge, and that neither had any idea of paying the rates provided for in that instrument, and that their participation in the execution thereof with the intent to use it only as a "front" for getting a permit for Steele was an act contrary to good morals and that tended to injustice and to interfere with the purity of the administration of the law such as puts both parties in *pari delicto* with no right to seek advantage or recovery out of paragraph 13, the spurious portion of the instrument.

These views are in no wise in conflict with the holdings of this Court in the case of *Bowen Motor Coaches vs. New York Casualty Company*, 139 F. 2d 332, but in conformity therewith, for in that case we held that under the facts "there was no corrupt agreement to violate the law, no crime was to be committed. The parties were trying to act in accordance with the statute." The inference is that if there had been a corrupt agreement to violate the law, or if the parties had been trying to violate the statute instead of acting

in accordance with it, the doctrine of *pari delicto* would have been applied.

In *Battles vs. Braniff Airways*, 146 F. 2d 336, we did not expressly say so, but impliedly we agreed with the Appellant's contention that since he was a receiver representing not merely the company but its creditors, he would not be adjudged in *pari delicto*.

There should be a distinction between a receiver suing in behalf of creditors and a plaintiff who is *particeps criminis* suing under the very statute that he so glibly violated.

Plaintiff, however, was not content to stand solely upon his alleged contract. He also claims a right of recovery because of the statutes of the State of Texas and the regulations and orders of its Railroad Commission. In other words, he asserts that he is entitled to recover under the contract sued on, and that he is also entitled to recover under the statute of Texas which provides that a contract carrier shall charge, and the shipper shall pay, the rates prescribed by the Commission, which cannot be less than the minimum rates charged by a common carrier performing similar services. Having definitely concluded that he has no right of recovery under paragraph 13 of the contract sued on, we next inquire whether or not the Plaintiff can sustain his claimed right to recover under the statute.[4] The pertinent statutes of Texas make it illegal for a contract carrier to charge other than the rates prescribed and fixed by the Commission, and the failure to comply with the law, or with the lawful regulations

[4] Art. 1690b, Texas Penal Code, Pars. (b), (c), (g), (h), and (i).

and orders of the Commission, is a misdemeanor punishable by fine. The violator is also subject to a penalty recoverable by the State at the suit of its Attorney General or the District, or County, Attorney. No Texas statute expressly declares that a contract contrary to the statutes or regulations shall be void, nor do any of them contain an express provision authorizing a suit by anyone—other than the Attorney General, the District, or County, Attorney, in a suit on behalf of the State of Texas to recover the penalty of $100.00 per day for each day's violation—such as is found in the Fair Labor Standards Act, the Anti Trust Act, or the Price Control Act. There is no ruling here of the Interstate Commerce Commission or other governmental agency that requires the carrier to sue to recover under-charges such as Interstate Commerce Commission Conf. Ruling #314, Bulletin 7, saying in part:

> "It follows that it is the duty of carriers to exhaust their legal remedies in order to collect undercharges from the party or parties legally responsible therefor."

It will be assumed, however, that any contract, the execution of which is a criminal offense, is illegal and unenforceable. It may also be true that even though there is no provision in the statute authorizing a person to bring suit under it, nevertheless, he may do so if he has been specially injured and if it clearly appears that the statute was enacted for his protection or benefit,[5] and if

[5] "An action for the violation of a statutory duty is generally maintainable by any person injured thereby, who suffers a special damage therefrom, and who is of a class entitled to take advantage of the law. Within the meaning of this rule, persons entitled to take advantage of the law are members of the class intended to be protected by the statute, or for the benefit of whom the statute was en-

he by his own participation in some illegal arrangement has not barred his right to relief through the processes of the Court.

The statute here does not expressly authorize a suit for the recovery of the prescribed rates by anyone and

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acted. Indeed, even though the violation of a statute is regarded as actionable, it is generally required that the injury be done to one of the class designed to be protected by the statute, or for whose benefit the statute was enacted, and to whom a duty of compliance with the statute is owed. It has also been stated as general rules that a statutory right of action may be maintained only for the benefit of the persons specified in the statute, and that where a right is given by statute, only those to whom the right is in terms given may avail themselves of its benefits." 50 Am. Jur., §587, page 582.

In *Norwood vs. Galveston, H. & S. A. Ry. Co.*, 34 S. W. 180, the Texas Court of Civil Appeals, citing and quoting Blackstone, said:

"The law gives no private remedy for anything but a private wrong."

"Where a statute prohibits the doing of a particular action affecting the public no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the part of the complainant to allege and prove that the doing of the act prohibited has caused him some special damage, some particular injury, beyond that which he may be supposed to have sustained in common with the rest of the queen's subjects by an infringement of the law."

In *Texas & N. O. R. Co. vs. Brotherhood of Ry. Steamship Clerks*, 33 F. 2d 13, we said:

"The violation of a duty created by statute, resulting in damage to one of a class for whose benefit the duty was imposed, confers a right of action upon the injured person, though the statute makes no provision as to a remedy for such wrong. Marbury vs. Madison, 1 Cranch. 137, 163, 2 L. Ed. 60; DeLima vs. Bidwell, 182 U. S. 1, 176, 21 S. Ct. 743, 45 L. Ed. 1041; 1 Corpus Juris 951."

* * * *

"A statutory right of action exists only in favor of those for whose benefit the duty is imposed, and Plaintiff must show not only a violation of the statute, but that the inquiry complained of was occasioned thereby." 1 C. J. 952, §47.

* * * *

"* * * The true rule is that the question depends upon the intention of the legislature as construed from the provisions of the particular statute; and if it appears that the duty imposed is merely for the benefit of the public, and the fine or penalty a means of enforcing the duty and punishing a breach thereof, the fine or penalty is exclusive, and a private action cannot be maintained for injury sustained by reason of the breach. If, on the other hand, it appears that the duty imposed is also for the benefit of particular individuals or classes of individuals, a private right of action arises for injury sustained by reason of the breach, by any person the statute was designed to protect, provided the injury sustained by him is a special injury different from that inflicted on the general public, and has resulted proximately from and because of the violation; * * *" 1 C. J. S. §12, page 996.

we should not hold it to be the law that one has a statutory cause of action under a statute which he has intentionally violated and disregarded unless there is express language, or a clear intent on the part of the Legislature, that the particular statute was enacted for his benefit and protection.

In the instant case the statute was not for the benefit of contract carriers but for the benefit of common carriers.

The Plaintiff here can show no special damage. He received a clear profit of ten per cent out of every truckload that he hauled. Moreover, he cannot claim special damages to himself which he himself caused by his own conduct and contract.

In 1 Tex. Jur. §18, page 625, appears this statement:

> "In general the law affords to private persons a remedy for private wrongs only. So where a statute prohibits the doing of a particular act affecting the public, the mere commission of the prohibited act confers no personal or private right of action."

A statute that is passed for the protection of the general public against negligence can be the basis of a suit for a recovery by anyone specially injured as a result of failure to observe such statute, similarly as one may recover under a contract entered into by third parties for his benefit, such as a contract between the City and a water company to supply water with which to fight fire, but the provision in the statute here to require a contract carrier, who is in competition with

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Mugge vs. Tampa Water Works Company, 53 Fla. 371, 42 So. 81.

common carriers rendering substantially similar service to charge not less than such common carrier was to protect the common carrier from indiscriminate and disastrous competition. It will be noted here that the statutory requirement was not that the contract carrier should not charge *more* than a common carrier, but that it should not charge *less* than such common carrier. It was not a regulation for the benefit of the citizens generally in an endeavor to secure cheaper transportation, nor was it for the purpose of benefitting one who purposefully violated it.[7] Moreover, a contract carrier who hauls for only one customer cannot be guilty of discrimination in the matter of rates. He has no other customer in whose favor he could discriminate. The statutes against discrimination by a contract carrier having only one customer were never intended for the benefit or protection of either the contract carrier or his customer, but were intended only to prevent a contract carrier who is in competition with a common carrier in the performance of similar services from underselling the common carrier. The present suit is not a suit by a common carrier; it is not a suit for penalties by the Attorney General; but it is a suit by one who violated the statute for three years, and until the end of his contract, meanwhile being protected from any hazard of financial loss by receiving all expenses back, plus a profit of ten per cent, and who,

[7] "Appellant presents several propositions, but we deem it unnecessary to discuss them, because the law is well settled that no legal right arises out of an unlawful act; and no action can be maintained upon a claim arising out of or based upon an illegal act, if plaintiff must rely in any way upon the illegal transaction to make out or establish his case. Dufek v. Harrison County (Tex. Civ. App.) 289 S. W. 741; 1 Tex. Jurisprudence, 621; 1 C. J. 957; 1 R. C. L. 317; and numerous cases there cited and discussed." *Heard vs. Denman*, 29 S. W. 2d 824.

when such profit ceased to flow, then decided that the statute ought to be enforced—but only as against his contractee.

Surely a Daniel has come to judgment and from what a remarkable source!

The statute was not enacted for his protection, and we are of the opinion that the Plaintiff has no right of action either under the contract or under the statute.

The judgment should have been for the Defendant and the cause is reversed with directions to enter such judgment.

REVERSED.

HUTCHESON, Circuit Judge, Dissenting:

I deprecate as much as my associates do the fact that appellant, a trusted employee of appellee and well represented by counsel, has welshed on his agreement, deliberately and thoughtfully entered into on advice of counsel, and in the name of the law is profiting thereby. But I cannot agree that appellee may in law be allowed to have the service performed without paying the statutory rate it agreed, and the law compelled it to pay. I think it clear that the district judge was right in the view he took, that the authorities in Texas leave in no doubt that rates prescribed by the Texas Railroad Commission are the only proper rates which may be charged and that a cause of action arises out of the statute in favor of any person who performs the services for which the rates are prescribed. The Railroad Commission's general order of 1931, therefore, prescribing common carrier rates as minimum rates

was applicable to Steele's permit and was valid and enforceable. The supplemental contract for a less rate which was never approved by the Commission was not a valid contract of carriage, and though the parties acted, and payments were made, under it, this constitutes no defense to an action for the statutory rate. *Herrin v. Marmion*, 113 SW (2d) 291; *Pittsburgh v. Fink*, 250 U. S. 577. On the authority of Texas cases which apply the same doctrine to insurance rates that they do to carrier rates, we held in *Bowen Motor Coaches v. N. Y. Casualty Co.*, 139 F. (2d) 332, that no contract could change the statutory rates and that they must be collected. To the suggestion made there that because the parties were in *pari delicto* in making an unlawful contract, plaintiff could not recover, we said, "There was here no corrupt agreement to violate the law. No crime was to be committed." In *Battles v. Braniff*, 146 F. (2) 338, we held that no matter how illegal an agreement, to pay a less premium than the statute was, or how illegally it was entered into, it would be ineffective to prevent recovery in a suit on the policy for the premiums the law fixed as due.

I cannot, therefore, agree with the view of my associates, that the appellee should be permitted to have its freight hauled for a less charge than others were under the law compelled to pay, and appellant, because in *pari delicto* with appellee, may not recover. In the first place, I do not agree that the evidence supports the view the majority opinion expresses that the parties entered into their arrangements with the deliberate purpose of defeating the law. Their letters and their conduct, I think, show beyond question that they

thought they were not evading but complying with the law. From the letters of Christopher and the attorneys for General Mills no other view may be gathered than that they thought that the services to be performed by Steele would not be similar services to those performed by common carriers, and the Commission's 1931 general order, making common carrier rates minimum for contract carriers performing similar services did not therefore apply. I am of the opinion, therefore, that when the agreement was made, they did not intend to commit a crime, that is, to violate the law and subject themselves to a penalty of $200.00 a day each. If this is the correct view of the facts, and I think it is, then clearly the *pari delicto* doctrine does not apply. *Bowen v. N. Y. Casualty Co., supra.*

But if I could agree that there was a deliberate intent to defraud the statute, I still could not agree with the majority, whether plaintiff's suit is to be regarded as on the written contract which was exhibited to and filed with the Commission, or on the right arising out of the statute to recover the legal charges for the services rendered, for the right to recover the legal charges and no other rests on an overriding public policy. This policy is so imperative that it may not be defeated by the conduct of the parties in entering into legal and evasive arrangements which it is the very purpose of the policy to strike down. It remains to consider only whether the suit was on the contract signed by the parties and exhibited to the Commission as a basis for the permit, and, therefore, the defense of limitation is unavailable, or was on the statutory obligation arising from the performance of the service, and, therefore,

limitation has barred a part of the recovery. It seems clear to me that plaintiff's suit is on the contract, which the parties made and exhibited to the Commission, and in which they agreed to pay the legal rates, and that the case is ruled by *Central Freight Lines v. C & S Motor Freight Lines*, 125 SW 615. There the court held ineffective a private agreement which, as here, was not submitted to the Commission. I think the judgment should be affirmed, and I respectfully dissent from its reversal.

A True copy:

Teste:

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Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

APPENDIX "A-1"

In The
UNITED STATES CIRCUIT COURT OF APPEALS
For the Fifth Circuit

No. 11313

GENERAL MILLS, INC., Appellant,
versus
LEO H. STEELE, Appellee.

Appeal from the District Court of the United States for the Northern District of Texas.

(February 15, 1946.)

ON PETITION FOR REHEARING

Before WALLER and LEE,
Circuit Judges.

PER CURIAM: We are indebted to the Attorney General of the State of Texas for his able brief as *amicus curiae* on the petition for rehearing.

The suit here was not one to enforce, to rescind, nor to enjoin an executory or uncompleted contract. It was a suit by one party, in *particeps criminis*, against another in like situation, under a fully completed contract, wherein it was sought to penalize one party to the extent of $37,000.00 and to reward the prime of-

fender in like amount. We refer to the Appellee as the "prime offender" for the reason that it was he, who got the permit from the Railroad Commission of the State of Texas, who used the highways of the State, and who engaged in the business of contract transportation which the Texas law sought to regulate. Although we do not undertake to measure the degree of *delictum*, it certainly cannot be insisted that the shipper had a greater responsibility to the public than the certificate holder, or truck operator. The statutes of Texas allow recovery of a penalty against both parties at the suit of the Attorney General, which penalty would go to the State of Texas, and not to a violator of the law. We have been cited no case in Texas that compels the conclusion that where the Court finds both parties in *pari delicto* under a *contract that has been fully executed* it should lend its aid to one in preference to the other. The law of Texas is to the contrary. See *Wright vs. Wight & Wight*, 229 S. W. 881.

In 10 Tex. Jur., page 242, §140, there is this statement:

> **"Recovery of Money or Property Parted With.**— Where an illegal contract has been fully executed, the courts will not interfere to litigate the claims of parties *in pari delicto* who have been injured thereby; neither a court of law nor a court of equity will aid either party to recover or reinvest himself with any title or interest vested in the other, but will leave them in the same position as to vested interests as they, by their own acts, have placed themselves. So money paid under an illegal contract may not be recovered back, where

the contract has been fully executed and the parties are *in pari delicto*."

See also 12 Amer. Jur. page 725 §213.

This is also the law as announced in Federal courts. In *Spring Company vs. Knowlton*, 103 U. S. 49, the Supreme Court cited recognized texts on contracts in support of the same rule announced in *Wright vs. Wight & Wight, supra*, and also quoted the following statement from one of those texts on contracts:

> "Where money has been paid upon an illegal contract, it is a general rule that if the contract be executed and both parties are in pari delicto neither of them can recover from the other the money so paid, but if the contract continues executory and the party paying the money be desirous of rescinding it, he may do so and recover back by action of in debitatus assumpsit for money had and received."

The petition for rehearing is

DENIED.

A True copy:

.....

Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

APPENDIX "B"

VERNON'S CIVIL STATUTES OF THE STATE OF TEXAS ANNOTATED

Art. 911b. Motor Carriers and regulation by Railroad Commission—Definitions

Sec. 1. When used in this Act unless expressly stated otherwise:

(a) The term "person" means and includes an individual, a firm, co-partnership, corporation, company, an association or a joint stock association.

(b) The term "Commission" means the Railroad Commission of the State of Texas.

(c) The term "Highway Commission" means the Board of Highway Commissioners of the State of Texas.

(d) The term "public highway" means every street, road or highway in this State.

(e) The term "certificate" means certificate of public convenience and necessity issued under this Act.

(f) The term "permit" means the permit issued to contract carriers under the terms of this Act.

(g) The term "motor carrier" means any person, firm, corporation, company, co-partnership, association or joint stock association, and their lessees, receivers or trustees appointed by any Court whatsoever owning, controlling, managing, operating or causing to be operated any motor-propelled vehicle used in transporting property for compensation or hire over

any public highway in this State, where in the course of such transportation a highway between two or more incorporated cities, towns or villages is traversed; provided, that the term "motor carrier" as used in this Act shall not include, and this Act shall not apply to motor vehicles operated exclusively within the incorporated limits of cities or towns.

(h) The term "contract carrier" means any motor carrier as hereinabove defined transporting property for compensation or hire over any highway in this State other than as a common carrier. As amended Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 1.

Certificate of Convenience and Necessity

Sec. 3. No motor carrier shall, after this Act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, a certificate of public convenience and necessity pursuant to a finding to the effect that the public convenience and necessity require such operation. No motor carrier shall, after this Act goes into effect, operate as a contract carrier without first having obtained from the Commission a permit so to do, which permit shall not be issued until the applicant shall have in all things complied with the requirements of this Act. As amended Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 3.

Supervision and Regulation by Commission

Sec. 4. (a) The Commission is hereby vested with power and authority and it is hereby made its duty to supervise and regulate the transportation of property

for compensation or hire by motor vehicle on any public highway in this State, to fix, prescribe or approve the maximum or minimum or maximum and minimum rates, fares and charges of each motor carrier in accordance with the specific provisions herein contained, to prescribe all rules and regulations necessary for the government of motor carriers, to prescribe rules and regulations for the safety of operations of each of such motor carriers, to require the filing of such monthly, annual or other reports and other data of motor carriers as the Commission may deem necessary, to prescribe the schedules and services of motor carriers operating as common carriers, and to supervise and regulate motor carriers in all matters affecting the relationship between such carriers and the shipping public whether herein specifically mentioned or not. As amended Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 4.

(c) The Commission is further authorized and empowered, and it shall be its duty, to supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the shipping public that may be necessary in the interest of the public.

(d) The Commission is further authorized and empowered, and it shall be its duty, to supervise and regulate motor carriers in all matters whether specifically mentioned herein or not so as to carefully preserve, foster and regulate transportation and to relieve the existing and all future undue burdens on the highways arising by reason of the use of the high-

ways by motor carriers, adjusting and administering its regulations in the interests of the public.

The Commission, in prescribing and adopting rules and regulations and in forming its conclusions and in prescribing its orders, shall invite the Highway Commission's opinion on the condition of the public highways involved and the ability of said highways to carry the existing and proposed additional traffic, and the Commission shall give due and proper consideration to the orders, regulations, ordinances or recommendations of the Highway Commission of Texas; provided, however, nothing herein contained shall be deemed to restrict the powers of the Highway Commission under existing laws. The Commission shall also give due and proper consideration to the recommendations of the Commissioners' Courts of the several Counties and to the recommendations of the local government of any municipality through or between which motor carriers operate. As amended Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 4.

Application for permits; special permits

Sec. 6. (a) No motor carrier now operating as a contract carrier or that may hereafter desire to engage in the business of a contract carrier shall so operate until it shall have received a permit from the Commission to engage in such business and such permit shall not be issued until the applicant shall have in all things complied with the requirements of this Act; nor shall such permit be issued unless the character of business being done or to be done by the applicant strictly conforms with the definition of a contract car-

rier. The Commission shall have the power to suspend for ten (10) days any existing permit after notice and hearing and to revoke any existing permit when it appears that such permit holder has disobeyed or violated any provision of this Act or of General Laws regulating motor vehicles or violated any rule or regulation of the Commission authorized by this Act.

(b) No application for a permit shall be considered by the Commission unless it be reduced to writing and set forth the following facts:

(1) It shall contain the name and address of the applicant and the names and addresses of its officers, if any, and shall give full information concerning the financial condition and physical properties of the applicant.

(2) The application shall set forth the nature of the transportation in which the applicant wishes to engage, stating substantially the territory to be covered by the operation and including the condition and character of the roads over which the transportation is to be performed.

(3) It shall give a description of each vehicle which the applicant intends to use, including weight and size of vehicle and its carrying capacity.

Rules and regulations for contract carriers

Sec. 6aa. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Com-

mission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service. Added Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 6.

Permits not granted as contract carrier to person operating as common carrier

Sec. 6bb. No application for permit to operate as a contract carrier shall be granted by the Commission to any person operating as a common carrier and holding a certificate of convenience and necessity, nor shall any application for certificate of convenience and necessity be granted by the Commission to any person operating as a contract carrier nor shall any vehicle be operated by any motor carrier with both a permit and a certificate. Added Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 6.

Hearing at Austin; notice to existing owners and to Highway Commission

Sec. 11. Upon the filing of said application for a certificate or permit, the Commission shall fix a time and place for hearing, and the place of hearing shall be in the City of Austin, Texas, unless otherwise ordered by the Commission. Notice of the filing of said application, and the time and place of hearing, shall be given by mail not less than ten (10) days, exclusive of the day of mailing before such hearing, addressed to the owner or owners of existing transportation facilities serving such territory as applicant seeks to serve, as well as to the Highway Commission of the

State of Texas, the County Judge or Judges of the Counties and to the mayor of any incorporated city or town through which such carrier seeks to operate. As amended Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 11.

Review of decisions of Commission by district court of Travis County; appeals

Sec. 20. If any motor carrier or other party at interest be dissatisfied with any decision, rate, charge, rule, order, act, or regulation adopted by the Commission, such dissatisfied person, association, corporation, or party after failing to get relief from the Commission may file a petition setting forth the particular objection to such decision, rate, charge, rule, order, act or regulations, or to either or all of them in the District Court in Travis County, Texas, against said Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the Appellate Court having jurisdiction of said cause and said appeal shall be at once returnable to said Appellate Court having jurisdiction of said cause and said action so appealed shall have precedence in said Appellate Court over all causes of a different character therein pending; provided, that if the court be in session at the time such right of action accrues the suit may be filed during such term and stand ready for trial after ten days' notice. In all trials under this section the burden of proof shall rest upon plaintiff, who must show by the preponderance of evidence

that the decisions, rates, regulations, rules, orders, classifications, acts, or charges complained of are unreasonable and unjust to it or them. The Commission shall not be required to give any appeal bond in any cause arising hereunder and no injunction shall be granted against any order of the Commission without hearing unless it shall clearly appear that irreparable injury will be done the complaining party if the injunction is not granted.

General policy

Sec. 22b. Declaration of Policy. The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public. Added Acts 1931, 42nd Leg., p. 480, ch. 277, Sec. 21.

APPENDIX "C"

State of Texas

Railroad Commission of Texas,
Austin.

Commissioners: C .V. Terrell, Chairman, Lon A. Smith, Pat M. Neff, C. F. Petet, Secretary.

General Order No. 25.

Austin, Texas, August 22, 1931.

Whereas, Chapter 314, of the General Laws of the State of Texas, passed by the Forty-first Legislature, Regular Session, as amended by Chapter 24, of the General Laws of the Second Called Session thereof, having been further amended by Chapter 277 of the Acts of the Forty-second Legislature Regular Session, by declaring all persons, firms, co-partnerships, corporations, companies, associations and joint stock associations other than common carriers, engaged in the transportation of property for compensation or hire over the highways of Texas, to be Contract Motor Carriers.

And Whereas, said above mentioned acts imposed upon the Railroad Commission of Texas, the duty to fix, prescribe or approve rates and charges of such Contract Motor Carriers, as well as to fix, prescribe or approve just and reasonable rules and regulations to be observed by such Contract Motor Carriers.

It is, Therefore, Ordered by the Railroad Commission of Texas, that, effective August 22, 1931, all Contract Motor Carriers as hereinbefore defined, be and they are hereby ordered to observe and apply as mini-

mum temporarily and until further orders of this Commission, pursuant to hearing called for Monday, August 31, 1931, under Motor Freight Circular No. 1297, the rates, ratings, rules and regulations heretofore prescribed or approved by this Commission for observance by Class "A" Motor Carriers, as shown in Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1, as amended; Railroad Commission of Texas Motor Freight General Rules Circular No. 1, as amended; and Railroad Commission of Texas Commodity Tariff No. 2, (Cotton and Cotton Linters), as amended.

Penalties.

"If any motor carrier, or any officer, agent, clerk, servant or employee or receiver, or his agents, servants, or employee, of any motor carrier operating as a contract carrier in this State, shall, directly or indirectly, or by any special rate, rebate, drawback, or other device, for or on behalf of such contract carrier, knowingly charge, demand, or contract for, collect or receive from any person, firm or corporation a less compensation for any service rendered or to be rendered by any such contract carrier than is prescribed for said service by said commission, such contract carrier or any officer, clerk, servant or employee or receiver, his agents, servants or employee, of such contract carrier shall be guilty of misdemeanor and, upon conviction shall be fined in a sum not to exceed two hundred dollars ($200.00) for each offense; and every person who violates or fails to comply with, or procures, aids or abets any contract carrier in the violation of the provisions

hereof, shall likewise be guilty of a misdemeanor and, upon conviction shall be punished by a fine of not more than two hundred dollars ($200.00) for each offense."

(Section 16 (i) New Motor Carrier Law.)

RAILROAD COMMISSION OF TEXAS,
C. V. TERRELL,
Chairman.
LON A. SMITH,
Commissioner.

Attest:

C. R. McNAMEE,
(Seal) Acting Secretary.

APPENDIX "C-1"

Motor Freight Class and Commodity Tariff No. 1-A

Effective 7-26-40.

Seventh Revised Page 15 (Cancels 16th Revised Page 15).

Section No. 3.

General Application of Rates.

Item No. 470. Rates, Rules and Regulations in this Tariff, or as May be Amended, Shall be Observed:

(A) By Common Carrier Motor Carriers on Texas Interstate Traffic. (See Exception.)

Exception: The rates, ratings, rules and regulations provided herein will not apply between Beaumont and Port Arthur on Traffic transported by F. N. Ragsdale for the account of Railway Express Agency, Incorporated.

(B) By contract carrier motor carriers as minimum, on Texas Intrastate Traffic, unless permits issued by the Commission provided to the contrary.

(Cir. 1001, General Order 25 and Cirs. 1514, 2073 and 2198.)